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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

TRAVELERS CASUALTY AND SURETY  
COMPANY OF AMERICA, a Connecticut  
corporation,

Plaintiff,

VS.

WILLIAMS BROTHER, INC., an Nevada corporation; PEEK CONSTRUCTION COMPANY, a Nevada corporation; MICHAEL WILLIAMS, an individual; JOSIE WILLIAMS, an individual; ASHLEY WILLIAMS, an individual; MARIA WILLIAMS, an individual; MARK GUBLER, an individual; DAWNA GUBLER, an individual; DARIN GUBLER, an individual; and KAREN GUBLER, an individual; BRENDA COMPTON PEEK, an individual; MICHAEL L. PEEK, an individual; ECCL HOLDINGS, LLC, a Nevada limited liability company;; BLC NEVADA TRUST DATED APRIL 20, 2006, a Nevada Trust;

Case No.: 2:12-cv-00058-KJD -RJH

MOTION FOR PRELIMINARY  
INJUNCTION

### Defendants.

Plaintiff Travelers Casualty and Surety Company of America ("Travelers") moves the Court, for its order requiring defendants Williams Brother, Inc. ("WBI") and Peek Construction Company ("PCC") to provide full access to their books and records, project

1 files, including daily logs, subcontracts, purchase orders, change orders, bank account  
 2 statements, and canceled checks. This motion is supported by the Complaint, the exhibits  
 3 attached thereto, the Declaration of Gerald M. Ormiston, and the supporting Memorandum  
 4 of Points and Authorities.

5 **MEMORANDUM OF POINTS AND AUTHORITIES**

6 **I. BACKGROUND FACTS**

7 As alleged in the Complaint, and as set forth in the supporting declaration of Gerald  
 8 M. Ormiston (attached hereto as Exhibit "A;" hereafter, "Ormiston Declaration"), Travelers  
 9 is a surety company that stands as surety for selected contractors. WBI and PCC are  
 10 contractors that were required to provide payment and performance bonds on certain  
 11 public works projects. Because Nevada state law requires that all public works be  
 12 performed by a construction company that is bonded, the surety that writes these bonds  
 13 requires the company's owners, principals and related companies, to exonerate, indemnify  
 14 and collateralize the surety against loss by signing a General Agreement of Indemnity  
 15 ("GAI").

16 To induce Travelers to issue bonds, WBI and PCC each executed a GAI, copies of  
 17 which were attached to the complaint in this matter as Exhibits "A" and "B."<sup>1</sup> Under the  
 18 terms of the GAIs, WBI and PCC agreed to "exonerate, indemnify and save [Travelers]  
 19 harmless from and against all Loss."<sup>2</sup>

20 Most pertinent to Travelers' immediate needs, and the basis for this motion, is the  
 21 agreement of WBI and PCC to "furnish upon demand . . . the records of Indemnitors  
 22 including, but not limited to, books, papers, records, documents, contracts, reports,  
 23 financial information, accounts and electronically stored information . . . ."<sup>3</sup> This clause –  
 24 the "books and records" clause – is critical in instances such as present themselves here, as it  
 25 provides Travelers with the assurances that critical documentation is available for Travelers to  
 26 determine the financial health of WBI and PCC; to determine the status of bonded projects; to

27  
 28 <sup>1</sup> PCC's obligations under its GAI were accepted by Rider attached to a prior GAI executed by the  
 predecessor to PCC. Ormiston Declaration, ¶ 3.

<sup>2</sup> Ormiston Declaration, ¶ 4.

<sup>3</sup> Ormiston Declaration, ¶ 9.

1 evaluate and adjust payment bond claims; and to take steps based on the conditions revealed in  
 2 the documentation.

3 Since 2009, Travelers issued over \$29 million dollars of bonds on behalf of WBI and  
 4 over \$40 million of bonds on behalf of PCC (collectively, the "Bonds").<sup>4</sup> Travelers  
 5 undertook this almost \$70 million of potential outstanding liability in specific reliance on  
 6 the promises made by WBI and PCC in their GAIs. If either WBI or PCC defaulted in their  
 7 obligations under any or all of the projects bonded by Travelers, Travelers would be  
 8 required to respond quickly and to enforce the promises contained in the GAI.  
 9 Unfortunately, this is the exact situation in which Travelers finds itself in. However, WBI  
 10 and PCC seek to renege on the very promises that induced Travelers to expose itself to  
 11 liability on the Bonds. Travelers requests, by virtue of this motion, the Court's assistance.

12 **Adjusting Payment Bond Claims**

13 In 2011, Travelers began receiving claims against the Bonds by unpaid  
 14 subcontractors and suppliers of both WBI and PCC. Many lawsuits have been filed against  
 15 Travelers on the Bonds.<sup>5</sup> As Travelers attempted to work through the claims and lawsuits,  
 16 the owners of WBI and PCC refused to cooperate with Travelers, refused to indemnify  
 17 Travelers, failed to post collateral, and, most pertinent to this motion, failed to provide  
 18 access to the books and records upon Travelers' demand and as required by the GAIs.<sup>6</sup>  
 19 Travelers, to date, has paid bond claims, including costs and attorneys' fees, in the current  
 20 amounts of \$2,529,574.07 as to WBI Bonds and \$2,317,308.41 as to PCC Bonds.<sup>7</sup>

21 Additional claims are asserted against the Bonds that Travelers will be forced to pay  
 22 and it will continue to incur costs, expenses, and attorney fees.<sup>8</sup> At this time, Travelers'  
 23 total loss cannot be accurately estimated.<sup>9</sup> Travelers has set initial reserves of \$3,098,505 for  
 24 WBI, additional reserves of \$5,872,172 for PCC, and additional reserves of \$50,000 for EI  
 25

26 <sup>4</sup> Ormiston Declaration, ¶ 11.

27 <sup>5</sup> Ormiston Declaration ¶ 12.

28 <sup>6</sup> Ormiston Declaration ¶ 13.

<sup>7</sup> Ormiston Declaration ¶ 14.

<sup>8</sup> Ormiston Declaration ¶ 15.

<sup>9</sup> In part, because WBI and PCC deny Travelers access to the books and records needed for such a determination.

1 Camino Construction, PCC's predecessor, to cover its initial projected Loss related to bonds  
 2 issued for these entities.<sup>10</sup>

3 Without immediate access to WBI's and PCC's books and records, Travelers is  
 4 unable to accurately adjust additional claims or defend itself in the numerous lawsuits  
 5 against its Bonds.<sup>11</sup> Without immediate access to the project records, statements of account  
 6 for each project, canceled checks and bank statements, Travelers cannot determine what  
 7 claimants have been paid and, if so, how much.<sup>12</sup>

8 **Determining Project Status and Preparing to Complete Public Projects**

9 Recently, Travelers has discovered that WBI's and PCC's progress on bonded  
 10 projects has slowed or stopped altogether and owner notices of defaults are imminent.<sup>13</sup> As  
 11 WBI and PCC shut down operations, any additional delay in completing the bonded public  
 12 works projects will result in increased costs, decreased contract balances due to assessment  
 13 of liquidated damages, and delay to the public's use of these important projects.<sup>14</sup> Travelers  
 14 needs immediate access to the project records and all financial records to assess the state of  
 15 the projects and to complete those projects after the owners declare default. Without  
 16 immediate access to WBI's and PCC's project records, Travelers cannot address the current  
 17 issues on these important public projects to further their completion as will be required.<sup>15</sup>

18 **Sales of Travelers' Collateral**

19 To further increase the exigency of the requirement for access to WBI's and PCC's  
 20 records, Travelers has been informed that WBI and PCC have been selling off their  
 21 equipment at auctions, which equipment is subject to Travelers' security interest, and, in  
 22 some instances, have obtained the proceeds in derogation of Travelers' rights under the  
 23 GAIs and its security interest.<sup>16</sup> In the GAIs, WBI and PCC granted Travelers a security  
 24 interest in their equipment, accounts, deposits, letter of credit rights, securities, all contract  
 25

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26 <sup>10</sup> *Id.*

27 <sup>11</sup> Ormiston Declaration, ¶ 16.

28 <sup>12</sup> *Id.*

<sup>13</sup> Ormiston Declaration, ¶¶ 18, 19.

<sup>14</sup> Ormiston Declaration, ¶ 19.

<sup>15</sup> Ormiston Declaration, ¶ 19.

<sup>16</sup> Ormiston Declaration, ¶ 20.

1 rights, and all "General Intangibles." (collectively, the "Collateral")<sup>17</sup> Travelers perfected  
 2 that interest by filing with the Nevada Secretary of State's Office.<sup>18</sup> PCC has not provided  
 3 the necessary documentation to allow Travelers to determine its interests and what  
 4 proceeds, if any, are due Travelers as a result of these sales.<sup>19</sup>

5 Additionally, Travelers has been informed that a lot of equipment is scheduled for  
 6 public auction on January 27, 2012.<sup>20</sup> Prior UCC interests have been recorded against this  
 7 equipment, and other pieces of equipment. Without immediate access to WBI's and PCC's  
 8 books and records, including bank statements showing amounts owed to WBI's and PCC's  
 9 bank, debt records on equipment on which prior lenders have interests, and other such  
 10 prior or secondary debts, Travelers is unable to determine what its rights are to the  
 11 proceeds of any such auction.<sup>21</sup> If the equipment is sold in the ordinary course on January  
 12 27 to a good faith buyer in due course, and the proceeds are distributed to WBI and/or PCC,  
 13 Travelers will be without legal recourse to maintain its rights in that equipment and/or  
 14 proceeds.<sup>22</sup> Unless Travelers is provided immediate access to WBI's and PCC's books and  
 15 records, it cannot determine its rights in that equipment, in other equipment, and in the  
 16 proceeds of such prior and future sales.<sup>23</sup>

17 Travelers has been informed that the timing of the January 27 sale is critical and an  
 18 opportunity to generate significantly more proceeds will be lost if the auction does not take  
 19 place on January 27.<sup>24</sup> Unless Travelers is granted immediate access and/or provided the  
 20 books and records related to this equipment, Travelers will be unable to determine its  
 21 rights in that equipment and the sale may be jeopardized.<sup>25</sup>

22     ///

23     ///

25     <sup>17</sup> Ormiston Declaration, ¶ 7.

18     <sup>18</sup> Ormiston Declaration, ¶ 8.

26     <sup>19</sup> *Id.*

20     <sup>20</sup> Ormiston Declaration, ¶ 22.

21     <sup>21</sup> *Id.*

22     <sup>22</sup> *Id.*

23     <sup>23</sup> *Id.*

24     <sup>24</sup> Ormiston Declaration, ¶ 23.

25     <sup>25</sup> Ormiston Declaration, ¶ 23.

1 **Affirmative Claims**

2 Finally, again increasing the urgent need for the documentation requested in this  
 3 motion, Travelers has discovered numerous affirmative claims are being pursued by WBI  
 4 and PCC against various owners on certain projects.<sup>26</sup> Travelers has the prior rights in  
 5 these affirmative claims by virtue of the losses incurred on bonds issued by Travelers for  
 6 these public projects, its common law indemnity rights, and its UCC-related rights as  
 7 granted under the GAIs.<sup>27</sup> Travelers is informed that WBI and/or PCC have been  
 8 attempting to settle these claims, and others unknown to Travelers, obtain the proceeds  
 9 thereof in derogation of Travelers' prior rights.<sup>28</sup> Unless Travelers is granted immediate  
 10 access and/or provided copies of the project records for the projects on which affirmative  
 11 claims are being asserted, as well as the documentation of the claims themselves, Travelers  
 12 will be unable to determine the substance of such claims as well as the existence of  
 13 unknown claims to assert its prior interests, increasing Travelers' loss.<sup>29</sup>

14 **II. LEGAL ANALYSIS**

15 As this Court sits in diversity, it must apply the substantive law of the forum state;  
 16 in this case, Nevada. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938);  
 17 accord *Sims Snowboards, Inc. v. Kelly*, 863 F.2d 643, 646-47 (9th Cir.1988)(Federal Rule of  
 18 Civil Procedure 65 addresses only the procedural aspects of injunctive relief; state law  
 19 controls whether injunctive relief is appropriate).

20 Nevada's injunction standards, codified in N.R.S. § 33.010, have long been a part of  
 21 Nevada law. See, e.g., *Chisholm v. Redfield*, 75 Nev. 502, 347 P.2d. 523 (Nev.1959)(affirming  
 22 preliminary and permanent injunctions requiring the defendant to allow the lender to  
 23 operate defendant's lumber yards until sufficient moneys realized to reimburse lender  
 24 funds advanced for financing and operating same). Under Nevada law, injunctive relief  
 25 may be granted if there is no adequate remedy at law, a balancing of equities favors the  
 26 moving party, and success on the merits is demonstrated. *Chateau Vegas Wine, Inc. v.*

27  
 28 <sup>26</sup> Ormiston Declaration, ¶ 24.  
 29 Ormiston Declaration, ¶ 25.

<sup>28</sup> Ormiston Declaration, ¶ 26.

<sup>29</sup> Ormiston Declaration, ¶ 27.

1       *Southern Wine and Spirits of America, Inc.*, 265 P.3d 680 (Nev.2011) citing *State Farm Mut.*  
 2       *Auto. Ins. v. Jafbros Inc.*, 109 Nev. 926, 928, 860 P.2d 176, 178 (1993)(injunction may issue to  
 3       restrain a wrongful act that gives rise to a cause of action).

4           **A. Travelers has no adequate remedy at law.**

5       Well-settled law holds that sureties are entitled to specific performance of indemnity  
 6       provisions, such as collateral security provisions, because the surety lacks an adequate  
 7       remedy at law. *Safeco Ins. Co. of Am. v. Schwab*, 739 F.2d 431, 433 (9th Cir.1984)(“Sureties are  
 8       ordinarily entitled to specific performance of collateral security clauses.”); see also  
 9       *Milwaukie Constr. Co. v. Glens Falls Ins. Co.*, 367 F.2d 964, 966 (9th Cir.1965)(“[W]here [a  
 10      surety knows it will] have liability claims filed against it but [does] not know the amount of  
 11      those claims, the legal remedy of money damages [is] not adequate.”); accord *Hartford Fire*  
 12      *Ins. Co. v. Universal Import, LLC*, 2009 WL 4042699 (D.Nev.2009); see also *Liberty Mut. Ins.*  
 13      *Co. v. Aventura Eng’g & Constr. Corp.*, 534 F.Supp.2d 1290, 1321 (S.D.Fl.2008)(“a surety’s loss  
 14      of its right to collateralization cannot be adequately remedied through monetary  
 15      damages.”)(citing *United States Fid. & Guar. Co. v. Feibus*, 15 F.Supp.2d 579 (M.D.Pa.1998);  
 16      *United Bonding Ins. Co. v. Stein*, 273 F.Supp. 929 (E.D.Pa.1967)(legal remedy for subsequent  
 17      damages will not suffice when indemnitor refuses to voluntarily comply with surety’s  
 18      demands under GAI); see also *Serpa v. Darling*, 107 Nev. 299, 305, 810 P.2d 778, 782  
 19      (1991)(specific performance available when the remedy at law is inadequate).

20       Travelers’ remedies at law are inadequate in this case. Travelers must be able to  
 21       economically adjust payment bond claims, successfully defend payment bond lawsuits by  
 22       asserting defenses such as prior payment and release by the use of bank records and  
 23       canceled checks, quickly mobilize completion contractors for abandoned projects by use of  
 24       the project records such as plans, daily logs, and correspondence, and identify available  
 25       assets and its rights therein, including those in equipment and affirmative claims. The  
 26       documents that are the subject of this motion are unique and cannot be readily duplicated,  
 27       if at all.

28       ///

1           As outlined in the Ormiston declaration, there is an auction of certain equipment, in  
 2 which Travelers has a security interest, set for Jan 27, 2012. WBI and PCC have failed and  
 3 refused to provide Travelers with the information necessary for Travelers to determine its  
 4 rights in any of the equipment to be sold at auction. Unless the books and records are  
 5 produced prior to that date, Travelers may lose valuable rights due to the loss of equipment  
 6 and the proceeds thereof, once the equipment is sold in the ordinary course to a bona fide  
 7 purchaser for value. The required information includes records that will show current  
 8 balance owed to WBI's and PCC's bank, and Cashman Equipment, both of whom appear to  
 9 have prior UCC security interests, and a current list of all equipment, its current location, as  
 10 well as any appraisals, contracts for auction, and records of transfers of the equipment.

11           Additionally, Travelers is unaware of WBI's and PCC's remaining obligations to  
 12 other parties. Assets, including contract funds, equipment, accounts receivable, assets  
 13 placed improperly in self-settled trusts, all rightfully secured by the GAIs may be applied  
 14 to other debts and or secreted. The funds, proceeds of the sale of equipment, affirmative  
 15 claims of WBI and PCC could be misdirected to accounts of other companies or individuals.  
 16 A judgment for traditional money damages received later will be inadequate in this case of  
 17 limited assets for indemnification if Travelers is denied the ability to procure the books and  
 18 records to identify the available assets secured by the GAIs and the remaining  
 19 responsibilities under the bonds issued on behalf of WBI and PCC.

20           **B. The balance of equities favors Travelers.**

21           Under well-established Nevada law regarding sureties, "in the case of a surety sued  
 22 on a bond, the surety generally has no culpability whatsoever, and the entirety of its  
 23 obligation arises from its undertaking on behalf of the indemnitor and principal obligor."  
 24 *Transamerica Premier Ins. Co. v. Nelson*, 110 Nev. 951, 956, 878 P.2d 314, 317 (Nev.1994);  
 25 accord *Hartford Fire Ins. Co. v. Trustees of Const. Industry*, 125 Nev. 149, 164, 208 P.3d 884, 894  
 26 (Nev.2009)(recognizing surety's rights to be indemnified arise under both the terms of the  
 27 GAI and "principles of equity"); *Insurance Co. of the West v. Gibson Tile Co., Inc.*, 122 Nev.  
 28 455, 461, 134 P.3d 698, 701 (Nev.2006)(surety is entitled to indemnity regardless of whether

1 any payment is ultimately made by the surety); see also *Ins. Co. of the West v. Gibson Tile*  
 2 *Company, Inc.*, 122 Nev. 455, 134 P.3d 698 (Nev. 2006) (surety has the right to pursue its  
 3 indemnification claims under the plain terms of a general indemnity agreement).

4 Travelers has thus far been compelled to perform its bond obligations without the  
 5 benefit of its bargained-for rights under the GAI, including total access to WBI's and PCC's  
 6 books, records, and accounts. As set forth in the declaration of Gerald Ormiston, Travelers  
 7 has already paid bond claims and incurred costs, expenses, and attorneys' fees of  
 8 \$2,529,574.07 as to WBI Bonds and \$2,317,308.41 as to PCC Bonds. Although WBI and PCC  
 9 have provided certain selected documents, they have not opened their complete files to  
 10 Travelers as required by the GAIs. As an example, WBI and PCC have denied Travelers  
 11 access to several important categories of documents that would assist Travelers in  
 12 completing the contracts and evaluating claims, including subcontractor files (which should  
 13 include subcontracts, purchase orders, correspondence, payment applications,  
 14 subcontractor claims, and other documents), project schedules, bid and estimate files,  
 15 claims files (including pleadings and documents), and job cost and accounting records.  
 16 Such documents are unique and cannot be duplicated from other sources. Without the  
 17 project records, Travelers cannot readily take over defaulted projects, to the detriment of  
 18 the owners, and the public at large as the projects completion will be delayed substantially.

19 WBI and PCC simply have refused to comply with their agreement to provide access  
 20 to their documents. As noted by the Nevada Supreme Court in *Chisolm*, which affirmed the  
 21 trial court's preliminary and permanent injunctions against a recalcitrant guarantor, "[a]  
 22 court of equity . . . will not suffer men to depart from their agreements at pleasure . . . .")  
 23 *Chisolm*, 347 P.2d. at 525. And neither should this Court. The balance of equities lies  
 24 entirely with Travelers.

25 **C. Travelers clearly will succeed on the merits.**

26 Under Nevada law, as is applicable in this action based on diversity, the scope of a  
 27 contractual indemnity agreement is determined by the contract and is generally interpreted  
 28 like any contract. *George L. Brown Ins. v. Star Ins. Co.*, 237 P.3d 92 (Nev. 2010). Specifically as

1 to a GAI, such as in this case, the "purpose of the GIA to hold the surety harmless for all  
 2 expenses consequential to the issuance of the bond." *Transamerica Premier Ins. Co. v. Nelson*,  
 3 110 Nev. 951, 956, 878 P.2d 314, 317 (Nev.1994); accord *Insurance Co. of the West v. Gibson Tile*  
 4 *Co., Inc.*, 122 Nev. 455, 461, 134 P.3d 698, 701 (Nev.2006)(surety is entitled to indemnity  
 5 regardless of whether any payment is ultimately made by the surety); see also *Ins. Co. of the*  
 6 *West v. Gibson Tile Company, Inc.*, 122 Nev. 455, 134 P.3d 698 (Nev.2006)(surety has the right  
 7 to pursue its indemnification claims under the plain terms of a general indemnity  
 8 agreement).

9 As noted by the Nevada Supreme Court in *Nelson*, "in the case of a surety sued on a  
 10 bond, the surety generally has no culpability whatsoever, and the entirety of its obligation  
 11 arises from its undertaking on behalf of the indemnitor and principal obligor. Therefore,  
 12 the GIA entitles the surety to full recovery . . . ." *Nelson*, 110 Nev. at 956, 878 P.2d at 317.  
 13 The *Nelson* court reversed summary judgment in favor of the indemnitors and remanded  
 14 for entry of judgment in favor of the surety because, as in this case, the GAI provided that  
 15 evidence of payment was "prima facie evidence of the propriety, amount and existence of  
 16 Indemnitors' liability." (GAI, ¶ 3).

17 As set forth in the Ormiston declaration, Travelers has paid bond claims and  
 18 incurred costs and attorneys' fees of \$2,529,574.07 as to WBI Bonds and \$2,317,308.41 as to  
 19 PCC Bonds. Under the terms of the GAIs, and Nevada law, WBI and PCC must "exonerate,  
 20 indemnify and save [Travelers] harmless from and against all Loss." In fact, under the  
 21 terms of the GAIs, WBI and PCC agreed that any "evidence of payment shall be prima facie  
 22 evidence of the propriety, amount and existence of Indemnitors' liability." (GAI, ¶ 3).  
 23 Neither WBI nor PCC have any defense to these payments and their duty to indemnify  
 24 Travelers. There is no question that Travelers will prevail on the merits in this action.

### 25 III. CONCLUSION

26 Travelers has paid millions of dollars in payment bond claims, and continues to  
 27 investigate potentially millions more. To determine who has been paid by WBI and PCC in  
 28 whole or in part, Travelers needs all bank statements for 2011 and 2012, and checks and

1 transfers from such accounts, all releases, and project accounting documents. To evaluate  
2 and potentially to take over and complete the bonded projects, Travelers needs access to the  
3 project records, including subcontracts, change orders, plans, as-builts, daily logs, and  
4 correspondence. To marshal the remaining assets and to document its rights in equipment,  
5 Travelers needs access to equipment lists, appraisals, contracts for auction, and records of  
6 transfers of the equipment, as well as records as to any third-party interests therein.

7 The specific terms of the Indemnity Agreement provide Travelers access to all of WBI  
8 and PCC books and records. Travelers has no adequate remedy at law unless WBI and PCC are  
9 ordered by this Court immediately to provide access to the books and records as noted herein.  
10 The equities balance entirely on the side of Travelers. Its liabilities under the bonds is  
11 secondary to that of WBI and PCC yet it has paid millions of dollars in payment bond claims  
12 without any offer of reimbursement by any indemnitor. Finally, by virtue of having paid those  
13 millions of dollars, under the clear and express terms of the GAIs, Travelers will succeed on the  
14 merits in this case.

15 For all the foregoing reasons, Travelers respectfully requests that the Court grant the  
16 preliminary injunction requiring WBI and PCC to provide immediate access to their books  
17 and records.

18 DATED this 25<sup>th</sup> day of January, 2012.

19 JENNINGS, HAUG & CUNNINGHAM, LLP  
20  
21 By   
22 Elan S. Mizrahi  
23 Attorneys for Plaintiff  
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